

1 JAMES C. NIELSEN (111889)  
2 *jnielsen@nielsenhaley.com*  
THOMAS H. NIENOW (136454)  
3 *tnienow@nielsenhaley.com*  
4 NIELSEN, HALEY & ABBOTT LLP  
44 Montgomery Street, Suite 750  
5 San Francisco, California 94104  
Telephone: (415) 693-0900  
6 Facsimile: (415) 693-9674

7 Attorneys for Defendant and Counterclaimant  
8 UNITED NATIONAL INSURANCE COMPANY

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO/OAKLAND DIVISION

12  
13 FIREMAN'S FUND INSURANCE  
COMPANY,

14 Plaintiff,

15 v.  
16

17 UNITED NATIONAL INSURANCE  
18 COMPANY and DOES 1 through 10.

19 Defendants.

20 UNITED NATIONAL INSURANCE  
21 COMPANY, a Pennsylvania corporation,

22 Cross-complainant,

23 v.  
24

25 FIREMAN'S FUND INSURANCE  
COMPANY, a California corporation,  
26 INTERSTATE FIRE & CASUALTY  
COMPANY, an Illinois corporation, and  
27 Roes 1 through 10, inclusive,

28 Cross-defendants.

Action No.: C 07-04943 JL

ANSWER AND COUNTERCLAIM OF  
UNITED NATIONAL INSURANCE  
COMPANY.

DEMAND FOR JURY TRIAL.

**ANSWER TO COMPLAINT**

Defendant United National Insurance Company, in answer to the complaint filed by plaintiff Fireman's Fund Insurance Company, admits, denies, and alleges as follows:

1. Responding to the allegations in paragraph 1 of the complaint, United National admits and alleges that plaintiff makes the contentions set forth in paragraph 1 of the complaint. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 1 of the complaint.

2. Responding to the allegations in paragraph 2 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

3. Responding to the allegations in paragraph 3 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 3 of the complaint.

4. Responding to the allegations contained in paragraph 4 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

5. Responding to the allegations in paragraph 5 of the complaint, United National admits and alleges that it is a Pennsylvania corporation and that it is authorized to and sells insurance policies on a surplus-lines basis in the State of California. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 5 of the complaint.

6. Responding to the allegations in paragraph 6 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 6 of the complaint.

7. Responding to the allegations contained in paragraph 7 of the complaint, United National admits and alleges that it issued to named insured Cirrus Medical Staffing LLC, a policy of claims-made-and-reported professional liability insurance effective from January 27, 2006, to

1 January 26, 2007, with policy number AH-0000267 (the "United National policy") and that the  
2 United National policy sets forth to various terms, conditions, exclusions, and dollar limits of  
3 liability, all of which speak for themselves. Except as so admitted and alleged, United National  
4 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
5 every, and all of the allegations contained in paragraph 7 of the complaint.

6 8. Responding to the allegations in paragraph 8 of the complaint, United National is  
7 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*  
8 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in  
9 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number  
10 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted  
11 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
12 on that basis denies each, every, and all of the allegations contained in paragraph 8 of the  
13 complaint.

14 9. Responding to the allegations in paragraph 9 of the complaint, United National is  
15 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*  
16 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in  
17 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number  
18 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted  
19 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
20 on that basis denies each, every, and all of the allegations contained in paragraph 9 of the  
21 complaint.

22 10. Responding to the allegations in paragraph 10 of the complaint, United National is  
23 informed and believes and on that basis admits and alleges that a lawsuit styled *Tracy v. Lovelace*  
24 *Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in the State of  
25 New Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005  
26 07009, the documents of which speak for themselves. Except as so admitted and alleged, United  
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
28 each, every, and all of the allegations contained in paragraph 10 of the complaint.

1           11.     Responding to the allegations in paragraph 11 of the complaint, United National is  
2 informed and believes, and on that basis admits and alleges, that Interstate Fire & Casualty  
3 Company defended Cirrus Medical Services LLC in the *Tracy* action. Except as so admitted and  
4 alleged, United National lacks sufficient knowledge, information or belief to respond to and on  
5 that basis denies each, every, and all of the allegations contained in paragraph 11 of the  
6 complaint.

7           12.     Responding to the allegations in paragraph 12 of the complaint, United National  
8 admits and alleges that it received notice of the *Tracy* action and that United National issued a  
9 letter dated October 6, 2006, which speaks for itself, advising that United National would not  
10 defend Cirrus in the *Tracy* action, and reserving United National's rights to disclaim coverage for  
11 the *Tracy* action under the United National policy. Except as so admitted and alleged, United  
12 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
13 each, every, and all of the allegations contained in paragraph 12 of the complaint.

14           13.     Responding to the allegations in paragraph 13 of the complaint, United National  
15 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
16 every, and all of the allegations contained in paragraph 13 of the complaint.

17           14.     Responding to the allegations in paragraph 14 of the complaint, United National  
18 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself, advising  
19 that United National had determined that there was no coverage under the United National policy  
20 for the *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a  
21 claim first made and reported during Interstate Fire & Casualty Company's immediately  
22 preceding policy period, and stating that United National continued to reserve all of its rights  
23 under the policy. Except as so admitted and alleged, United National lacks sufficient knowledge,  
24 information or belief to respond to and on that basis denies each, every, and all of the allegations  
25 contained in paragraph 14 of the complaint.

26           15.     Responding to the allegations contained in paragraph 15 of the complaint, United  
27 National lacks sufficient knowledge, information or belief to respond and on that basis denies  
28 each, every, and all of the allegations contained in paragraph 15 of the complaint.

1           16.     Responding to the allegations in paragraph 16 of the complaint, United National  
2 admits and alleges that the United National policy includes, without the added italics, the policy  
3 language quoted in paragraph 16. Except as so admitted and alleged, United National lacks  
4 sufficient knowledge, information or belief to respond to and on that basis denies each, every, and  
5 all of the allegations contained in paragraph 16 of the complaint.

6           17.     Responding to the allegations in paragraph 17 of the complaint, United National  
7 denies each, every, and all of the allegations contained in paragraph 17 of the complaint.

8           18.     Responding to the allegations in paragraph 18 of the complaint, United National  
9 admits and alleges that the United National policy speaks for itself. Except as so admitted and  
10 alleged, United National lacks sufficient knowledge, information or belief to respond to and on  
11 that basis denies each, every, and all of the allegations contained in paragraph 18 of the  
12 complaint.

13           19.     Responding to the allegations in paragraph 19 of the complaint, United National  
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
15 and all of the allegations contained in paragraph 19 of the complaint.

16           20.     Responding to the allegations in paragraph 20 of the complaint, United National  
17 admits and alleges that the United National policy, which speaks for itself, includes the policy  
18 language quoted in paragraph 20, although the quoted language is set forth in a larger paragraph  
19 that has been omitted from paragraph 20. Except as so admitted and alleged, United National  
20 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
21 every, and all of the allegations contained in paragraph 20 of the complaint.

22           21.     Responding to the allegations in paragraph 21 of the complaint, United National  
23 admits and alleges that the United National policy, which speaks for itself, includes the policy  
24 language quoted in paragraph 21, although the quoted language is set forth in a larger paragraph  
25 that has been omitted from paragraph 21. Except as so admitted and alleged, United National  
26 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
27 every, and all of the allegations contained in paragraph 21 of the complaint.

28           22.     Responding to the allegations in paragraph 22 of the complaint, United National

1 admits and alleges that the United National policy speaks for itself. Except as so admitted and  
2 alleged, United National denies each, every, and all of the allegations contained in paragraph 22  
3 of the complaint.

4 23. Responding to the allegations in paragraph 23 of the complaint, United National  
5 denies each, every, and all of the allegations contained in paragraph 23 of the complaint.

6 24. Responding to the allegations in paragraph 24 of the complaint, United National  
7 denies each, every, and all of the allegations contained in paragraph 24 of the complaint.

8 25. Responding to the allegations in paragraph 25 of the complaint, United National  
9 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
10 and all of the allegations contained in paragraph 25 of the complaint.

11 26. Responding to the allegations in paragraph 26 of the complaint, United National  
12 admits and alleges that it contributed \$100,000 on behalf of Cirrus to settle the *Tracy* action.  
13 Except as so admitted and alleged, United National lacks sufficient knowledge, information or  
14 belief to respond and on that basis denies each, every, and all of the allegations contained in  
15 paragraph 26 of the complaint.

16 27. Responding to the allegations in paragraph 27 of the complaint, United National  
17 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
18 and all of the allegations contained in paragraph 27 of the complaint.

19 28. Responding to the allegations in paragraph 28 of the complaint, United National  
20 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

21 29. Responding to the allegations in paragraph 29 of the complaint, United National  
22 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
23 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
24 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
25 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
26 National contends that it has no obligation to reimburse Fireman's Fund of Interstate for any of  
27 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
28 National lacks sufficient knowledge, information or belief to respond to and on that basis denies



1 each, every, and all of the allegations contained in paragraph 29 of the complaint.

2 30. Responding to the allegations in paragraph 30 of the complaint, United National  
3 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
4 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
5 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
6 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
7 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of  
8 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
9 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
10 each, every, and all of the allegations contained in paragraph 30 of the complaint.

11 31. Responding to the allegations in paragraph 31 of the complaint, United National  
12 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
13 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
14 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
15 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
16 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of  
17 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
18 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
19 each, every, and all of the allegations contained in paragraph 31 of the complaint.

20 32. Responding to the allegations in paragraph 32 of the complaint, United National  
21 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
22 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
23 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
24 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
25 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of  
26 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
28 each, every, and all of the allegations contained in paragraph 32 of the complaint.

1           33.     Responding to the allegations in paragraph 33 of the complaint, United National  
2 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

3           34.     Responding to the allegations in paragraph 34 of the complaint, United National  
4 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
5 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
6 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
7 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
8 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
9 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to  
10 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
11 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
12 each, every, and all of the allegations contained in paragraph 34 of the complaint.

13           35.     Responding to the allegations in paragraph 35 of the complaint, United National  
14 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
15 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
16 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
17 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
18 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
19 Fireman's Fund or Interstate for all or part of any payment by Fireman's' Fund or Interstate to  
20 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
21 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
22 each, every, and all of the allegations contained in paragraph 35 of the complaint.

23           36.     Responding to the allegations in paragraph 36 of the complaint, United National  
24 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
25 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
26 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
27 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
28 the *Tracy* action, and that United National contends that it has no obligation to reimburse



1 Fireman's Fund or Interstate for all or part of any payment by Fireman's' Fund or Interstate to  
2 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
3 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
4 each, every, and all of the allegations contained in paragraph 36 of the complaint.

5 37. Responding to the allegations in paragraph 37 of the complaint, United National  
6 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
7 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
8 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
9 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
10 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
11 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to  
12 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
13 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
14 each, every, and all of the allegations contained in paragraph 37 of the complaint.

15 38. Responding to the allegations in paragraph 38 of the complaint, United National  
16 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

17 39. Responding to the allegations in paragraph 39 of the complaint, United National  
18 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
19 and all of the allegations contained in paragraph 39 of the complaint.

20 40. Responding to the allegations in paragraph 40 of the complaint, United National  
21 admits and alleges that it issued to Cirrus as named insured a policy of claims-made-and-reported  
22 professional liability insurance referenced in paragraph 7 of this answer. Except as so admitted  
23 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
24 on that basis denies each, every, and all of the allegations contained in paragraph 40 of the  
25 complaint.

26 41. Responding to the allegations in paragraph 41 of the complaint, United National  
27 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,  
28 advising that United National had determined that there was no coverage under the Untied

1 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to  
2 constitute a claim first made and reported during Interstate Fire & Casualty Company's  
3 immediately preceding policy period, and stating that United National continued to reserve all  
4 of its rights under the policy. Except as so admitted and alleged, United National lacks  
5 sufficient knowledge, information or belief to respond to and on that basis denies each, every,  
6 and all of the allegations contained in paragraph 41 of the complaint.

7 42. Responding to the allegations in paragraph 42 of the complaint, United National  
8 denies each, every, and all of the allegations contained in paragraph 42 of the complaint.

9 43. Responding to the allegations in paragraph 43 of the complaint, United National  
10 denies each, every, and all of the allegations contained in paragraph 43 of the complaint.

11 44. Responding to the allegations in paragraph 44 of the complaint, United National  
12 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

13 45. Responding to the allegations in paragraph 45 of the complaint, United National  
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each,  
15 every, and all of the allegations contained in paragraph 45 of the complaint.

16 46. Responding to the allegations contained in paragraph 46 of the complaint, United  
17 National admits and alleges that it issued to Cirrus as named insured a policy of claims-made-  
18 and-reported professional liability insurance referenced in paragraph 7 of this answer. Except as  
19 so admitted and alleged, United National lacks sufficient knowledge, information or belief to  
20 respond to and on that basis denies each, every, and all of the allegations contained in paragraph  
21 46 of the complaint.

22 47. Responding to the allegations in paragraph 47 of the complaint, United National  
23 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,  
24 advising that United National had determined that there was no coverage under the United  
25 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to  
26 constitute a claim first made and reported during Interstate Fire & Casualty Company's  
27 immediately preceding policy period, and stating that United National continued to reserve all  
28 of its rights under the policy. Except as so admitted and alleged, United National lacks

1 sufficient knowledge, information or belief to respond to and on that basis denies each, every,  
2 and all of the allegations contained in paragraph 47 of the complaint.

3 48. Responding to the allegations in paragraph 48 of the complaint, United National  
4 denies each, every, and all of the allegations contained in paragraph 48 of the complaint.

5 49. Responding to the allegations in paragraph 49 of the complaint, United National  
6 denies each, every, and all of the allegations contained in paragraph 49 of the complaint.

7 50. Responding to the allegations in paragraph 50 of the complaint, United National  
8 admits and alleges that plaintiff makes the contentions set forth in paragraph 50 of the complaint.  
9 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
10 respond and on that basis denies each, every, and all of the allegations contained in paragraph 50  
11 of the complaint.

12 51. Responding to the allegations in paragraph 51 of the complaint, United National  
13 incorporates by reference paragraphs 1 through 28 of this answer as though fully set forth here.

14 52. Responding to the allegations in paragraph 52 of the complaint, United National  
15 admits and alleges that plaintiff makes the contentions set forth in paragraph 52 of the complaint.  
16 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
17 respond and on that basis denies each, every, and all of the allegations contained in paragraph 52  
18 of the complaint.

19 53. Responding to the allegations in paragraph 53 of the complaint, United National  
20 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
21 and all of the allegations contained in paragraph 53 of the complaint.

22 54. Responding to the allegations in paragraph 54 of the complaint, United National  
23 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
24 and all of the allegations contained in paragraph 54 of the complaint.

25 55. Responding to the allegations in paragraph 55 of the complaint, United National  
26 admits and alleges that it issued a letter dated October 6, 2006, which speaks for itself, advising  
27 that United National would not defend Cirrus in the *Tracy* action, and reserving United  
28 National's rights to disclaim coverage for the *Tracy* action. United National further admits and

1 alleges that it issued a letter dated February 13, 2007, which speaks for itself, advising that United  
2 National had determined that there was no coverage under the United National policy for the  
3 *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a claim first  
4 made and reported during Interstate Fire & Casualty Company's immediately preceding policy  
5 period, and stating that United National continued to reserve all of its rights under the policy.  
6 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
7 respond and on that basis denies each, every, and all of the allegations contained in paragraph 55  
8 of the complaint.

9         56. Responding to the allegations in paragraph 56 of the complaint, United National  
10 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
11 and all of the allegations contained in paragraph 56 of the complaint.

12  
13         United National further alleges the following affirmative defenses:

14         1. As and for a first, separate defense, United National alleges that the complaint and  
15 each claim therein do not state facts sufficient to constitute a cause of action against United  
16 National.

17         2. As and for a second, separate defense, United National alleges that the plaintiff  
18 lacks standing to bring this action.

19         3. As and for a third, separate defense, United National alleges that the complaint and  
20 each cause of action in it are barred by the terms, provisions, conditions, limitations, and  
21 exclusions of the alleged United National policy. United National reserves the right to amend its  
22 answer to the Complaint to assert any additional defenses arising from the terms of the alleged  
23 United National insurance policy, and/or applicable insurance policy terms, provisions,  
24 conditions, limitations, and exclusions as may become apparent during the continuing course of  
25 discovery in this action.

26         4. As and for a fourth, separate defense, United National alleges that the complaint  
27 and each cause of action in it are barred by the terms, provisions, conditions, limitations, and  
28 exclusions of a policy of liability insurance issued by Interstate Fire & Casualty Company, policy

1 number ASC-1000204, to named insured Cirrus Medical Staffing, LLC, for the policy period  
2 January 27, 2005, to January 27, 2006. United National reserves the right to amend its answer to  
3 the Complaint to assert any additional defenses arising from the terms of the alleged Interstate  
4 insurance policy, and/or applicable insurance policy terms, provisions, conditions, limitations,  
5 and exclusions as may become apparent during the continuing course of discovery in this action.  
6

7 Wherefore United National prays for judgment as follows:

- 8 1. That the Court deny plaintiff's prayers for judicial declarations set forth in the  
9 complaint;  
10 2. That plaintiff take nothing by its complaint;  
11 3. That United National be awarded its costs of suit incurred herein;  
12 4. That United National be awarded its attorneys fees;  
13 3. For such other and further relief as the Court deems just and proper.  
14  
15  
16

17 **COUNTERCLAIM AGAINST FIREMANS' FUND INSURANCE COMPANY,**  
18 **INTERSTATE FIRE & CASUALTY COMPANY, AND ROES 1 THROUGH 10**

19 Counterclaimant United National Insurance Company, for its counterclaim against  
20 counterdefendants Fireman's Fund Insurance Company, Interstate Fire & Casualty Company, and  
21 Roes 1 through 10, inclusive, alleges as follows:  
22

23 **GENERAL ALLEGATIONS**

- 24 1. At all times herein mentioned, United National was and is a Pennsylvania  
25 corporation with its principal place of business in Bala Cynwyd, Pennsylvania.  
26 2. United National is informed and believes and thereon alleges that  
27 counterdefendant Fireman's Fund Insurance Company is a California corporation with its  
28 principal place of business in Novato, California.

1           3.       United National is informed and believes and thereon alleges that  
2 counterdefendant Interstate Fire & Casualty Company is an Illinois corporation, doing business in  
3 California, with its principal place of business in Chicago, Illinois.

4           4.       United National is unable to ascertain the true names and identities of those  
5 counterdefendants designated as Roes 1 through 10, inclusive. United National will ask leave of  
6 Court to amend this complaint and all subsequent pleadings to insert the true names and  
7 capacities of these fictitiously named counterdefendants when ascertained. The allegations and  
8 controversies alleged below with respect to the named counterdefendants Fireman's Fund and  
9 Interstate apply equally to Roes 1 through 10.

10          5.       Jurisdiction over United National's counterclaim is conferred by 28 U.S.C. §  
11 1367(a).

12          6.       Venue is proper in this Court under 28 U.S.C. § 1391(a)(1), because  
13 counterdefendant Fireman's Fund is a resident of this district.

14          7.       United National is informed and believes, and on that basis alleges, that Cirrus  
15 Medical Staffing LLC was sued in underlying litigation styled *Tracy v. Lovelace Sandia Health*  
16 *Services dba Albuquerque Regional Medical Center et al.*, which was filed in the State of New  
17 Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005 07009.  
18 United National is informed and believes, and on that basis alleges, that the *Tracy* action was a  
19 medical-malpractice action that was filed on or about September 14, 2005.

20          8.       United National is informed and believes, and on that basis alleges, that the first-  
21 amended complaint in the *Tracy* action alleges, at paragraph 3, that Cirrus employee Cathy  
22 Robinson was a "healthcare provider[] who treated Marilyn Tracy," the decedent whose death  
23 was the subject of the *Tracy* action. United National is informed and believes, and on that basis  
24 alleges, that the first amended complaint further alleges, at paragraph 28, that Cirrus "acting  
25 through its employee, agent and/or apparent agent or contractor, Cathy Robinson, RN, negligently  
26 failed to inform the physician on call of Marilyn Tracy's status," as a result of which, according  
27 to paragraph 23, Marilyn Tracy was pronounced dead on October 7, 2004.

28          9.       United National is informed and believes, and on that basis alleges, that N.M. Stat.



1 Ann. § 41-5-15 provides as follows:

2  
3 A. No malpractice action may be filed in any court against a qualifying health  
4 care provider before application is made to the medical review commission  
5 and its decision is rendered.

6  
7 B This application shall contain the following:

8  
9 (1) a brief statement of the facts of the case, naming the persons  
10 involved, the dates and the circumstances, so far as they are known,  
11 of the alleged act or acts of malpractice; and

12  
13 (2) a statement authorizing the panel to obtain access to all medical and  
14 hospital records and information pertaining to the matter giving rise  
15 to the application, and, for the purposes of is consideration of the  
16 matter only, waiving any claim of privilege as to the contents of  
17 those records. Nothing in that statement shall in any way be  
18 construed as waiving that privilege for any other purpose or in any  
19 other context, in or out of court.

20  
21 10. United National is informed and believes, and on that basis alleges, that N.M. Stat.

22 Ann. § 41-5-16 provides as follows:

23  
24 A. Upon receipt of an application for review, the commission's director or his  
25 delegate shall cause to be served a true copy of the application on the  
26 health care providers involved. Service shall be effected pursuant to New  
27 Mexico law. If the health care provider involved chooses to retain legal  
28 counsel, his attorney shall informally enter his appearance with the

1 director.

2  
3 B The health care provider shall answer the application for review and in  
4 addition shall submit a statement authorizing the panel to obtain access to  
5 all medical and hospital records and information pertaining to the matter  
6 giving rise to the application, and, for the purposes of its consideration of  
7 the matter only, waiving any claim of privilege as to the contents of those  
8 records. Nothing in that statement shall in any way be construed as  
9 waiving that privilege for any other purpose or in any other context, in or  
10 out of court.

11  
12 C. In instances where applications are received employing the theory of  
13 respondeat superior or some other derivative theory of recovery, the  
14 director shall forward such applications to the state professional societies,  
15 associations or licensing boards of both the individual health care provider  
16 whose alleged malpractice caused the application to be filed, and the health  
17 care provider named a respondent as employer, master or principal.

18  
19 11. United National is informed and believes, and on that basis alleges, that Interstate  
20 and Roes 1 through 10 issued to Cirrus as named insured a policy of liability insurance, number  
21 ASC-10000204, effective for the policy period January 27, 2005, to January 27, 2006. United  
22 National is informed and believes, and on that basis alleges, that the Interstate policy generally  
23 provides liability coverage to Cirrus on a claims-made-and-reported basis subject to limits of  
24 \$1,000,000 for each incident and \$3,000,000 in the aggregate.

25 12. United National is informed and believes, and on that basis alleges, that the  
26 Interstate policy sets forth the following language in Form 01-PL-4002 (03/04):

27 I. COVERAGE.

28 The Company will pay on behalf of the Insured all sums which the

**Insured** shall become legally obligated to pay as **Damages** for **Claims** first made against the Insured and reported to the Company during the **Policy Period**, as a result of **Bodily Injury, Property Damages** or **Personal Injury** caused by an **incident**, provided always that such **incident** happens:

A. on or after the policy effective date shown on the Declarations; or  
 B. at any time prior to the policy effective date shown on the Declarations if;

1. such **incident** happens on or subsequent to the “prior acts date” on the Declarations, and
2. no **insured** knew or could have reasonably foreseen that such **incident** might be expected to be the basis of a **Claim** or **Suit** on the effective date of this policy.

The Company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as **Damages** to which this insurance applies and the Company shall have the right and duty to defend any **Suit** against the **Insured** seeking **Damages** on account of such **Bodily Injury, Property Damage** or **Personal Injury**, even if any of the allegations of the **Suit** are groundless, false or fraudulent, but the Company shall not be obligated to pay any **Claims** or **Claims Expenses** or judgments or continue to defend any **Suit** after the applicable limit of the Company’s liability has been exhausted by payment of judgments or settlements.

\* \* \*

#### VI. WHEN **CLAIM** IS CONSIDERED AS FIRST MADE

A **Claim** shall be considered as being first made when the Company first receives written notice from the **Insured** advising that a **Claim** has been made and providing the details of the **Claim**.

1 All **Claims** arising out of the same or related **incident** shall be considered  
2 as having been made at the item the first such **Claim** is made, and shall be  
3 subject to the same limit of liability and only a single deductible, if any,  
4 shall apply.

5 \* \* \*

6 IX. DEFINITIONS

7 When used in this policy (including endorsement forming a part hereof):

8  
9 **"Bodily Injury"** means bodily injury, sickness or disease, mental anguish,  
10 psychological injury or emotional distress sustained by any person,  
11 including death at any time resulting therefrom;

12  
13 **"Claim"** means a demand for money or the filing of **Suit** naming the  
14 **Insured** and, in either case, alleging a **Bodily Injury, Property Damage**  
15 **or Personal Injury** as a result of an **Incident**.

16 \* \* \*

17 **"Damages"** means compensatory judgments, settlement or awards but  
18 does not include punitive or exemplary **Damages**, fines or penalties, the  
19 return of fees or other consideration paid to the **insured**, or the portion of  
20 any award or judgment caused by the multiplication of actual **Damages**  
21 under federal or state law. However, if a **Suit** is brought against the  
22 **Insured** with respect to a **Claim** for alleged acts or omissions falling  
23 within the scope of coverage afforded by this insurance seeking both  
24 compensatory and punitive or exemplary **Damages**, then the Company will  
25 afford a defense to such action, without liability however, for payment of  
26 such punitive or exemplary damages;

27 \* \* \*

28 **"Incident"** means any act or omission in the rendering of or failure to

render services by the **Insured**, or by any person for whom the **Insured** is legally responsible, in the conduct of the business or professional occupation specified in the Declarations.

Any such act or omission together with all related acts or omissions shall be considered one “**Incident**” and be subject to the same limit of liability;

\* \* \*

“**Suit**” means a civil proceeding in which **Damages** because of **Bodily Injury, Property Damage or Personal Injury** to which this insurance applies are alleged. “**Suit**” includes:

- A. an arbitration proceeding in which such **Damages** are claimed and to which the **insured** must submit or does submit with the Company’s consent; or
- B. any other alternative dispute resolution proceeding in which such **Damages** are claimed and to which the **Insured** submits with the Company’s consent.

13. United National issued to Cirrus as named insured a claims-made-and-reported professional liability insurance policy effective from January 27, 2006, to January 26, 2007, with policy number AH-0000267 (the “United National policy”)

14. The United National policy states as follows:

[From Form CPA-119(2.2005):]

#### **SECTION I—PROFESSIONAL LIABILITY COVERAGE**

##### **1. Insuring Agreement**

We will pay those sums that the insured becomes legally obligated to pay as “compensatory damages” as a result of a “wrongful act.” This insurance applies to injury only if a “claim” for damages to which no other insurance applies, because of the injury is first made against the insured and reported to us during the “policy period.” This insurance does not apply to injury caused by a “wrongful act” that takes place outside of the “covered

territory” or was committed before the Retroactive Date shown in the  
Declarations or after the “policy period.”

- a. A “claim” by a person or organization seeking damages will be  
deemed to have been made when notice of such “claim” is received  
and recorded by the insured or by us, which ever comes first;

\* \* \*

- c. We will have the right and duty to select counsel and to defend any  
“suit” seeking damages. However, we will have no duty to defend  
the insured against any “suit” seeking damages for injury to which  
this insurance does not apply

\* \* \*

## **2. Exclusions**

This insurance does not apply to:

\* \* \*

- s. Any “claim,” “suit,” or “wrongful act” that might result in a  
“claim” or “suit,” of which any insured had knowledge or could  
have reasonably foreseen, at the signing date of the application for  
this insurance.

\* \* \*

## **SECTION V—PROFESSIONAL LIABILITY CONDITIONS**

\* \* \*

### **4. Other Insurance**

If other valid and collectible insurance with any other insurer is available to  
the insured covering a “claim” also covered hereunder (except insurance  
purchased to apply in excess of the limit of liability hereunder), this  
insurance will be excess of, and not contribute with, such insurance. If the  
insured has other coverage with us covered a “claim” also covered by this  
policy or coverage Part, the insured must elect which policy or Coverage



Part will apply and we will be liable under the Coverage Part so elected and will not be liable under any other policy or Coverage Part.

\* \* \*

**5. Representations**

By accepting this policy, you agree:

- a. The statements in the Declarations and application, made part of this policy, are accurate and complete;
- b. Those statements are based upon representations you made to us;
- c. We have issued this policy in reliance upon your representations; and
- d. This policy embodies all of the agreements existing between you and us or any of our agents relating to this insurance.

\* \* \*

**SECTION VI—DEFINITIONS**

\* \* \*

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Claim" means a written demand upon the insured for "compensatory damages," including, but not limited to, the service of "suit" or institution of arbitration proceedings against the insured. "Claim" includes reports of accidents, acts, errors, occurrences, offenses or omissions which may give rise to a "claim" under this policy. "Claims" based on or arising out of the same act or interrelated acts of one or more insured will be considered to be based on a single "wrongful act."

\* \* \*

11. "Suit" means a civil proceeding in which damages for injury to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages to which you must submit or submit with our

1 consent.

- 2 12. "Wrongful act" means any act, error or omission in the furnishing of  
3 professional social services. It includes the furnishing of food, beverages,  
4 medications or appliances in connection with those services. All  
5 "wrongful acts" committed in the furnishing of professional social services  
6 to any one person will be considered one "wrongful act." All interrelated  
7 "wrongful acts" of one or more insured will be considered one "wrongful  
8 act."

9  
10 [From Form EPA-909 (5/2006):]

11 This endorsement modifies insurance provided under the following:

12 PROFESSIONAL LIABILITY COVERAGE PART

13 Paragraph 12. of SECTION VI.—DEFINITIONS is deleted and replaced by the  
14 following:

- 15 12. "Wrongful act" means:
- 16 a. any act or omission in the furnishing of healthcare services  
17 to a patient or client including the furnishing of food,  
18 beverages, medications, medical treatment or appliances in  
19 connection with such services and the postmortem handling  
20 of human bodies.
- 21 b. All "wrongful acts" committed in the furnishing of services  
22 to any one patient or client will be considered one  
23 "wrongful act." All interrelated "wrongful acts" of one or  
24 more insured will be considered one "wrongful act."

25  
26 15. United National is informed and believes, and on that basis alleges, that Interstate  
27 and/or Fireman's Fund agreed to defend and indemnify Cirrus in connection with the *Tracy*  
28 pursuant to the terms and provisions of the Interstate policy.

1                    FIRST CLAIM FOR DECLARATORY JUDGMENT—DUTY TO DEFEND

2            16.      United National incorporates by reference the allegations of paragraphs 1-15 of  
3 this counterclaim.

4            17.      An actual controversy has arisen and now exists between United National,  
5 Fireman's Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties  
6 under the Interstate and United National policies regarding the underlying *Tracy* action. United  
7 National contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were  
8 required to defend Cirrus in connection with the *Tracy* action, and that United National had no  
9 obligation to defend Cirrus in connection with the *Tracy* action. On the other hand, United  
10 National is informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and  
11 Roes 1 through 10, contend that they had no obligation to defend Cirrus in the *Tracy* action and  
12 that United National alone was obligated to defend Cirrus in the *Tracy* action, or, alternately, that  
13 Fireman's Fund, Interstate, and United National were jointly obligated to defend Cirrus in  
14 connection with the *Tracy* action. United National requests this Court to make and enter its  
15 binding judicial declarations in accordance with United National's contentions set forth in this  
16 paragraph. The requested declarations are both necessary and proper at this time under the  
17 circumstances in that the interest of judicial economy and substantial justice will be served  
18 thereby.

19  
20                    SECOND CLAIM FOR DECLARATORY JUDGMENT—DUTY TO INDEMNIFY

21            18.      United National incorporates by reference the allegations of paragraphs 1-15 of  
22 this counterclaim

23            19. An actual controversy has arisen and now exists between United National, Fireman's  
24 Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties under the  
25 Interstate and United National policies regarding the underlying *Tracy* action. United National  
26 contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were required to  
27 indemnify Cirrus in connection with the *Tracy* action, and that United National had no obligation  
28 to indemnify Cirrus in connection with the *Tracy* action. On the other hand, United National is

1 informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and Roes 1  
2 through 10, contend that they had no obligation to indemnify Cirrus in the *Tracy* action and that  
3 United National alone was obligated to indemnify Cirrus in the *Tracy* action, or, alternately, that  
4 Fireman's Fund, Interstate, and United National were jointly obligated to indemnify Cirrus in  
5 connection with the *Tracy* action. United National requests this Court to make and enter its  
6 binding judicial declarations in accordance with United National's contentions set forth in this  
7 paragraph. The requested declarations are both necessary and proper at this time under the  
8 circumstances in that the interest of judicial economy and substantial justice will be served  
9 thereby.

10 20. If the Court enters a judicial declaration in accordance with United National's  
11 contentions set forth in the preceding paragraph, United National is entitled to recover from  
12 defendants Fireman's Fund, Interstate, and Roes 1 through 10, or any of them, \$100,000, plus  
13 prejudgment interest under Cal. Civ. Code §§ 3287(a) and 3289(b), to reimburse United National  
14 for its contribution toward the settlement of the *Tracy* action.

15  
16 WHEREFORE, United National prays for judgment as follows:

- 17 a. That the Court make and enter a binding judicial declaration of the parties'  
18 respective rights and duties in accordance with United National's contentions set  
19 forth in paragraph 17 above,
- 20 b. That the Court make and enter a binding judicial declaration of the parties'  
21 respective rights and duties in accordance with United National's contentions set  
22 forth in paragraph 19 above,
- 23 c. That the Court order and enter a money judgment requiring counterdefendants  
24 Fireman's Fund, Interstate, Roes 1 through 10, and any of the them, to reimburse  
25 United National \$100,000, plus prejudgment interest under Cal. Civ. Code  
26 §§3287(a) and 3289(b), for the money it contributed to settlement of the *Tracy*  
27 action.
- 28 d. That United National be awarded its costs of suit incurred herein; and

1 e. For such other and further relief as the Court deems just and proper.

2  
3 Respectfully submitted,

4 NIELSEN, HALEY & ABBOTT LLP

5  
6 Dated: October 1, 2007

By: 

Thomas H. Nienow

7 Attorneys for Defendant and Counterclaimant  
8 UNITED NATIONAL INSURANCE COMPANY  
9  
10  
11

12 **DEMAND FOR JURY TRIAL**

13 Defendant and counterclaimant United National Insurance Company demands trial by jury in  
14 this action.

15 Respectfully submitted,

16 NIELSEN, HALEY & ABBOTT LLP

17  
18 Dated: October 1, 2007

By: 

Thomas H. Nienow

19 Attorneys for Defendant and Counterclaimant  
20 UNITED NATIONAL INSURANCE COMPANY  
21  
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28

*Fireman's Fund Insurance Co. v. United National Ins. Co.*

United State District Court, Northern District Court No.: C 07-04943 JL

**PROOF OF SERVICE**

I declare that:

I am a citizen of the United States, employed in the County of San Francisco. I am over the age of eighteen years, and not a party to the within cause. My business address is 44 Montgomery Street, Suite 750, San Francisco, California 94104. On the date set forth below I served the following document(s) described as:

**ANSWER AND COUNTERCLAIM OF UNITED NATIONAL INSURANCE COMPANY.**

☐ (BY FACSIMILE) by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date.

☐ (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at San Francisco, California.

☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be delivered by hand this date to the offices of the addressee(s).


☐ (BY OVERNIGHT DELIVERY) I caused such envelope(s) to be delivered to an overnight delivery carrier with delivery fees provided for, addressed to the person(s) on whom it is to be served.

☒ (BY ELECTRONIC SERVICE) by submitting an electronic version of the document(s) to be served on all parties listed on the service list on file with the court as of this date.

**Attorney for Plaintiff, Fireman's Fund Ins. Co.**

Christopher J. Borders  
Casey A. Hatton  
Hinshaw & Culbertson LLP  
One California Street, 18th Floor  
San Francisco, CA 94111  
Tel: (415) 362-6000  
Fax: (415) 834-9070

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 1 2007, at San Francisco, California.

  
\_\_\_\_\_  
Fatima Puente